REQUEST UNDER THE FREEDOM OF INFORMATION ACT

July 9, 2013

National Freedom of Information Office
U.S. EPA
FOIA and Privacy Branch
1200 Pennsylvania Avenue, N.W. (2822T)
Washington, DC 20460

RE: FOIA Request – Certain Agency Records: Documents relied upon for representations made in John B. Ellis Memo to NARA's Paul Wester

BY ELECTRONIC MAIL: hq.foia@epa.gov

National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please consider this request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq.[1] CEI is a non-profit public policy institute organized under section 501(c)3 of the tax code and with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

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[1] We choose to not file this via FOIAOnline because, as we have noted to FOIAOnline tech support and in recent requests to no useful effect, that system does not function with Safari web browser or with the recommended web browsers with (at least the undersigned's two) Mac computers, impeding requester's ability to attach additional discussion and limiting discussion of, e.g., fee waiver, to two thousand characters per field.

Please provide us, within twenty working days,[2] copies of:

1) all records relied upon by John B. Ellis, EPA Agency Records Officer,[3] for the following statements in his April 11, 2008 memorandum to Paul Wester, Director, Modern Records Program, National Archives and Records Administration (reporting discovery of certain record-management problems):

a) "in the 1990s, the Agency's Office of Environmental Information (OEI)(and its predecessor organization) assigned Administrators and Acting Administrators two e-mail accounts", (p. 1), and

b) "The dual-account structure was first implemented during former Administrator Carol Browner's tenure (January 22, 1993 - January 19, 2001)..." (p. 2);

2) all other records collected, obtained, or viewed by Mr. Ellis in the discovery, investigation, recreation and reporting of the original creation of these secondary accounts "in the 1990s", *i.e.*, the first creation of such an account for and assignment of such an account to Carol Browner, including any notes, correspondence (including but not limited to email, texting, instant messaging, memos, or otherwise), copies of primary documents, or other records; and

3) all other correspondence (including but not limited to email, texting, instant messaging, memos, or otherwise) explaining, discussing or referencing this discovery, recreation and reporting of these secondary accounts detailed in the April 11, 2008 memo.

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[2] *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion at pages 24-25, *infra*.

[3] Agency Records Officer, John B. Ellis, CRM, Phone: 202-566-1643, Fax: 202-566-1639, E-mail: ellis.john@epa.gov, Mail Code: 2822T; http://www.epa.gov/records/people/.

The locations most obvious to begin EPA's search are those under the control of, or accessed, at relevant times by Mr. Ellis, including but not limited to email, his desktop computer (including files and folders representing records transferred when computer equipment has been upgraded/replaced), including any file(s) he created or maintained at any time in the process of discovery, investigation, recreation and reporting of the original creation of these secondary accounts; to the extent that Mr. Ellis and/or his assistant(s) has at any relevant time elected to use any of the following for this purpose this request also contemplates searching non-official email addresses used for work-related purposes, SharePoint, and other on-line storage like BOX or Google Docs/Drive.

Background to this Records Request

We are interested in locating copies of records pertaining in any way to the creation and assignment of a secondary e-mail address(es) for the EPA Administrator and Acting Administrator "in the 1990s", and records, and/or copies of original or primary records, referencing or relating to such records and created or obtained during the discovery, investigation, recreation and reporting of these accounts related in the above-cited April 11, 2008 memo.

These records are of significant public interest for reasons including that the secondary accounts were initiated for and with the active participation of former EPA administrator Carol Browner, who publicly stated she did not use her EPA computer for email in explaining her

directive to erase her EPA computer hard drive and backup tapes,[4] in apparent violation of 18 U.S.C. 2071 and in violation of an order by the U.S. District Court for the District of Columbia.[5]

These original or primary records or any copies thereof have been particularly elusive and EPA states about them, in the aforementioned litigation, that records ten years or older are typically destroyed. However, in 2008 Agency Records Officer John B. Ellis possessed agency records sufficient to allow him to make numerous representations to the National Archives and Records Administrator (NARA), as required under the Federal Records Act (FRA) when certain record-management issues emerge, including that "in the 1990s, the Agency's Office of Environmental Information (OEI)(and its predecessor organization) assigned Administrators and Acting Administrators two e-mail accounts", (memo, p. 1), and "The dual-account structure was first implemented during former Administrator Carol Browner's tenure (January 22, 1993 - January 19, 2001)..." (memo, p. 2).

We seek any copies of the original or primary records supporting these 2008 representations that Ellis may have used. As noted, above, we also seek Ellis's notes,

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[4] We refer to the case *Landmark Legal Foundation v. Environmental Protection Agency* (CV: 00-2338 (RCL)). See, e.g., "'She needed her files deleted; she wanted her files deleted', [computer technician contractor Kevin] Bailey testified in the Landmark lawsuit. "I would like my files deleted. I want you to delete my files." Something like that.'...Browner said she doesn't think her request affected the case because she seldom used her computer - except for occasional word processing or travel reservations." John Solomon, "EPA Head Browner Asked for Computer Files to Be Deleted", Associated Press, June 29, 2001, http://www.mail-archive.com/ctrl@listserv.aol.com/msg70823.html.

[5] At an April 2001 hearing in the *Landmark Legal* case EPA, represented by the United States Attorney's Office, revealed that on the same day Judge Royce Lamberth issued a preliminary injunction at Landmark's request to preserve all responsive records (January 19, 2001), then-administrator Carol Browner Browner ordered the hard drive in her computer and that of her assistant to be erased. "Despite the Court's order, the hard drives of several EPA officials were reformatted, email backup tapes were erased and reused, and individuals deleted emails received after that date." *See* Memorandum Opinion holding EPA in contempt, July 24, 2003.

correspondence and other records as described created or copied in that discovery, investigation, recreation and reporting.

According to information available to us as plaintiffs in relevant litigation, EPA has to date sought neither *the record copies* specifically requested herein *from the principal Mr. Ellis*, nor Mr. Ellis's input as to how he was able to make the above-cited assertions. That is, *what records were available to him and relied upon in 2008 to lead to this knowledge and support these claims, where are they now, what was done with them, did he retain any copies or notes or a file on this development?* This is despite tremendous media and congressional oversight attention to revelations flowing from this Ellis/Wester memo since CEI first publicized it and the secondary accounts the memo disclosed and discussed. It is also despite EPA obtaining declarations to file, in pending litigation, from individuals who were not principals in this 2008 discovery, when Ellis is the party most able to provide the relevant information about what such records exist (*e.g.*, EPA recently filed a declaration by Eric Wachter regarding records potentially responsive to HQ-FOI-01270-12 which declaration consists, in relevant parts, mostly of speculation (July 2, 2013 in Case 1:12-cv-01617, *CEI v. EPA*, DCDC)).

EPA's response to this request should remedy this and fill the hole in the public and legislative discussion about the relevant issues arising out of discovery of these accounts and the highly controversial "Richard Windsor" address -- which on its face violates EPA policy implementing the Federal Records Act requiring that all correspondence reveal the party's identity.[6] Given that EPA and those rushing to its public defense on related issues repeatedly informed the press that this practice has been common since the accounts' origination in the

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[6] See, e.g., http://www.epa.gov/records/tools/disposing.htm, http://www.epa.gov/records/faqs/email.htm.

Browner days, responsive records will also shed light on that publicly argued position that, so far, is not supported.[7]

In processing and responding to this request it is not material to state that EPA frequently destroys (primary, or original) records more than ten years old; we seek records used by Mr. Ellis in 2008, of which he likely maintained copies in the process of his discovery, investigation, recreation and reporting of these accounts. To the extent any such responsive records are on the Agency's computers, servers and/or accounts or possessed in hard copy, they were plainly sent and received in the course of employment with the Agency using Agency resources or otherwise in the conduct of Agency-related business. All such described records are "agency records".

EPA Owes CEI a Reasonable Search, Which Includes a Non-Conflicted Search

FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994).

It is well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). The act is designed to "pierce the veil of administrative secrecy and to open agency action to the light of

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[7] *See, e.g.*, Martosko, David, "Phony email account used by recently-resigned EPA administrator was NOT standard practice and broke federal law, researcher responds to Sen. Barbara Boxer", *Daily Mail* (UK), April 11, 2013, http://www.dailymail.co.uk/news/article-2307730/Phony-email-account-used-recently-resigned-EPA-administrator-NOT-standard-practice-broke-federal-law-researcher-responds-Sen-Barbara-Boxer.html.

scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352 (1976). It is a transparency-forcing law, consistent with "the basic policy that disclosure, not secrecy, is the dominant objective of the Act." *Id*.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of disclosure").

The reasonableness of the search activity is determined ad hoc but there are rules, including that the search must be conducted free from conflict of interest. (In searching for relevant documents, agencies have a duty "to ensure that abuse and conflicts of interest do not occur." *Cuban v. S.E.C.*, 744 F.Supp.2d 60, 72 (D.D.C. 2010). See also *Kempker-Cloyd v. Department of Justice*, No. 97-cv-253, 1999 U.S. Dist. LEXIS 4813, at *12, *24 (W.D. Mich. Mar. 12, 1999) (holding that the purpose of FOIA is defeated if employees can simply assert that records are personal without agency review; faulting Department of Justice for the fact that it "was aware that employee had withheld records as 'personal' but did not require that 'he submit those records for review' by the Department.)).

For these reasons CEI expects this search be conducted free from conflict of interest. Conflicted parties include the National FOIA Officer Larry Gottesman, whom CEI has informed the Agency on several recent occasions is and has proved himself to be conflicted out of reviewing requests by the undersigned due to undersigned having named him in

litigation for improper behavior,[8] which Mr. Gottesman followed by a spate of apparently retaliatory actions in his official capacity. Mr. Gottseman should have no role, formal or informal, in responding to any aspect of this request.

Withholding and Redaction

Please identify and inform us of all responsive or potentially responsive records within the statutorily prescribed time, and the basis of any claimed exemptions or privilege and to which specific responsive or potentially responsive record(s) such objection applies. See FN 2, *supra*.

If EPA claims any records or portions thereof are exempt under one of FOIA's discretionary exemptions we request you exercise that discretion and release them consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama**, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will

[8] Re: HQ-FOI-0152-12 and HQ-FOI-0158-12, filed as *American Tradition Institute v. EPA*, CV: 13-112 U.S. District Court for the District of Columbia. This filing also led to unfavorable press coverage (see, e.g., "Public interest group sues EPA for FOIA delays, claims agency ordered officials to ignore requests", *Washington Examiner*, January 28, 2013, http://washingtonexaminer.com/public-interest-group-sues-epa-for-foia-delays-claims-agency-ordered-officials-to-ignore-requests/article/2519881), and was followed by a series of facially improper fee waiver denials to undersigned, by Mr. Gottesman, who regardless should not have participated in the review of these matters.

be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

Nonetheless, if your office takes the position that any portion of the requested records is exempt from disclosure, please inform us of the basis of any partial denials or redactions. In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. §552(b).

Further, we request that you provide us with an index of those documents as required under V*aughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1972), with sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and "describ[ing] each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. Department of Justice*, 830 F.2d 210, 223-24 (D.C. Cir. 1987).

We remind EPA it cannot withhold entire documents rather than producing their "factual content" and redacting the confidential advice and opinions. As the D.C. Court of Appeals noted, the agency must "describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents." *Id.* at 254 n.28. As an example of how entire records should not be withheld when there is reasonably segregable information, we note that basic identifying information (who, what, when) is not "deliberative". As the courts have emphasized, "the deliberative process

privilege directly protects advice and opinions and *does not permit the nondisclosure of underlying facts* unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process." *See Mead Data Central v. Department of the Air Force*, 566 F.2d 242, 254 n.28 (D.C. Cir. 1977) (emphasis added).

For example, EPA must cease its ongoing pattern with CEI of over-broad claims of b5 "deliberative process" exemptions to withhold information which is not in fact truly antecedent to the adoption of an Agency policy (*see Jordan v. Do*J, 591 F.2d 753, 774 (D.C. Cir. 1978)), but merely embarrassing or inconvenient to disclose.

If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *See Mead Data Central v. Department of the Air Force*, 455 F.2d at 261.

Claims of non-segregability must be made with the same practical detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

Satisfying this Request contemplates providing copies of documents, in electronic format if you possess them as such, otherwise photocopies are acceptable.

Please provide responsive documents in complete form, with any appendices or attachments as the case may be.

Request for Fee Waiver

This discussion is detailed as a result of our recent experience of agencies, particularly EPA, improperly using denial of fee waivers to impose an economic barrier to access, an improper means of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.[9]

1) Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest

CEI requests waiver or reduction of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge...if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); see also 40 C.F.R. §2.107(l), and (c).

The information sought in this request is not sought for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as a 501(c)3 educational organization (not a "Religious...Charitable, Scientific, Literary, Testing for Public Safety, to Foster National or International Amateur Sports Competition, or Prevention of Cruelty to Children or Animals Organization[]"). With no possible commercial interest in these records, an

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[9] *See* February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at http://images.politico.com/global/2012/03/aclufffeewvrfoialtr.pdf; *see also National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," OpentheGovernment.org, February 23, 2012, http://www.openthegovernment.org/node/3372.

assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010). Specifically, the public interest fee waiver provision "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. "The legislative history of the fee waiver provision reveals that it was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,' in particular those from journalists, scholars and nonprofit public interest groups." *Better Government Ass'n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); SEN. COMM. ON THE JUDICIARY, AMENDING THE FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).[10]

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[10] This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that "rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." *Better Gov't v. State*. They therefore, like Requester, "routinely make FOIA requests that potentially would not be made absent a fee waiver provision", requiring the court to consider the"Congressional determination that such constraints should not impede the access to information for appellants such as these." *Id*.

Congress enacted FOIA clearly intending that "fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information." *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Given this, "insofar as ...[agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information." *Better Gov't v. State* (internal citations omitted). The courts therefore will not permit such application of FOIA requirements that "'chill' the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage." *Id*. As such, agency implementing regulations may not facially or in practice interpret FOIA's fee waiver provision in a way creating a fee barrier for Requester.

"This is in keeping with the statute's purpose, which is 'to remove the roadblocks and technicalities which have been used by . . . agencies to deny waivers.'" *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987)(quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester's ability to utilize FOIA -- as well as many nonprofit organizations, educational institutions and news media who will benefit from disclosure -- depends on its ability to obtain fee waivers. For this reason, "Congress explicitly recognized the importance and the

difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the 'public benefit' test for FOIA fee waivers. This waiver provision was added to FOIA 'in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as '"toll gates" on the public access road to information.'" *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities "essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions." That is true in the instant matter as well.

Indeed, recent EPA assertions to undersigned in relation to various recent FOIA requests, both directly and through counsel reflecting its pique over the robustness of said FOIAing efforts (and subsequent, toned-down restatements of this acknowledgement), prove too much in the context of EPA now serially denying CEI's fee waiver requests, given that it reaffirms that CEI is precisely the sort of group the courts have identified in establishing this precedent.

Courts have noted FOIA's legislative history to find that a fee waiver request is likely to pass muster "if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on

public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

The subject matter of the requested records specifically concerns identifiable operations or activities of the government. The requested records directly relate to high-level promises by the President of the United States and the Attorney General to be "the most transparent administration, ever" in that they address problems obtaining records as described on pp. 4-5, *supra*, regarding documents plainly available and relied upon for a significant memo to NARA required by FRA upon the discovery of unauthorized record destruction. This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the administration's transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of "study Obama transparency", referenced, *infra*).

Particularly after requester's recent discoveries using FOIA, its publicizing certain EPA record-management and electronic communication practices and CEI's other efforts to disseminate the information, the public, media and congressional oversight bodies are very interested in how widespread are the violations of this pledge of unprecedented transparency and, particularly, in the issue central to the present request.

This request, when satisfied, will further inform this ongoing public discussion.

We emphasize that **a Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct.** Instead, the question is whether the requested

information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003).

For the aforementioned reasons, potentially responsive records unquestionably reflect "identifiable operations or activities of the government."

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request. The requested records have an informative value and are "likely to contribute to an understanding of Federal government operations or activities" just as did various studies of public records reflecting on the administration's transparency, returned in the above-cited search "study Obama transparency", and the public records themselves that were released to those groups, contributed to public understanding of specific government operations or activities: this issue is of significant and increasing public interest, in large part due to the administration's own promises and continuing claims, and revelations by outside groups accessing public records. To deny this and the substantial media and public interest, across the board from Fox News to PBS and The Atlantic, as well now as Associated Press regarding secondary email accounts, generally, would be arbitrary and capricious, as would be denial that shedding light on **this heretofore unexplored aspect** of the "secondary account" and "Windsor" controversies would further and significantly inform the public.

Given the economic and social impact of the policies and activities imposed by Ms. Browner, the controversy over her having her hard drive destroyed ("reformatted") in the face of requests for her emails -- and her subsequent claim that she did not use her computer for email, followed by revelation she had an account created that "Few EPA staff members, usually only high-level senior staff, even know that these accounts exist" (Ellis/Wester memo, p. 2) -- and controversies that emerged after revelation of these secondary accounts, it is important for information relating to the origination of these accounts be made available to the public.

Similarly, the notion that disclosure of evidence revealing the creation of these non-public accounts will not significantly inform the public at large about operations or activities of government is facially absurd.

Instead, recent experience derived from related EPA email-related FOIA disclosures cited, above, affirms beyond reasonable challenge that disclosure and dissemination of this information will facilitate meaningful public participation in the decision-making process, therefore fulfilling the requirement that the documents requested be "meaningfully informative" and "likely to contribute" to an understanding of your agency's operations or activities that are at present the most publicly attended EPA activities (*see, e.g.*, an internet search for "EPA email", which returns stories relating to recently exposed electronic communication practices and Google suggests search completions of "...alias", "...address" and "...scandal").]

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information that is not already in the**

public domain. There is no reasonable claim to deny that, to the extent the requested information is available in the public domain, these are forms obtained and held only by EPA. It is therefore clear that the requested records are "likely to contribute" to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons. CEI intends to present these records for public scrutiny and otherwise to broadly disseminate the information it obtains under this request by the means described, herein. CEI has spent years promoting the public interest advocating sensible policies to protect human health and the environment, routinely receiving fee waivers under FOIA (until recently, but even then on appeal) for its ability to disseminate public information. Further, as demonstrated herein and in the above litany of exemplars of newsworthy FOIA activity, requester and particularly undersigned counsel have an established practice of utilizing FOIA to educate the public, lawmakers and news media about the government's operations and, in particular, have brought to

light important information about policies grounded in energy and environmental policy, like EPA's,[11] specifically in recent months relating to transparency and electronic record practices.

Requester intends to disseminate the information gathered by this request via media reporters and media appearances (the undersigned appears regularly, to discuss his work, on national television and national and local radio shows, and weekly on the radio shows "Garrison" on WIBC Indianapolis and the nationally syndicated "Battle Line with Alan Nathan").

Requester also publishes materials based upon its research via print and electronic media, as well as in newsletters to legislators, education professionals, and other interested parties.[12] For a list of exemplar publications, please see http://cei.org/publications. Those activities are in fulfillment of CEI's mission. We intend to disseminate the information gathered by this request

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[11] In addition to the coverage of undersigned counsel's recent FOIA suit against EPA after learning of an order to perform no work on two requests also involving EPA relationships with key pressure groups, this involves EPA (see, e.g., http://washingtonexaminer.com/epa-refuses-to-talk-about-think-tank-suit-demanding-docs-on-officials-using-secret-emails/article/2509608#.UH7MRo50Ha4, referencing revelations in a memo obtained under FOIA; *Horner et al. (CEI) v. EPA* (CV-00-535 D.D.C., settled 2004)), see also CEI requests of the Departments of Treasury (see, e.g., http://www.cbsnews.com/8301-504383_162-5314040-504383.html, http://www.cbsnews.com/8301-504383_162-5322108-504383.html), and Energy (see, e.g., http://www.foxnews.com/scitech/2011/12/16/complicit-in-climategate-doe-under-fire/, http://news.investors.com/ibd-editorials/031210-527214-the-big-wind-power-cover-up.htm?p=2), and NOAA (see, e.g., http://wattsupwiththat.com/2012/10/04/the-secret-ipcc-stocker-wg1-memo-found/, http://wattsupwiththat.com/2012/08/21/noaa-releases-tranche-of-foia-documents-2-years-later/), NASA (See, e.g., http://legaltimes.typepad.com/blt/2010/11/global-warming-foia-suit-against-nasa-heats-up-again.html, which FOIA request and suit produced thousands of pages of emails reflecting agency resources used to run a third-party activist website, and revealing its data management practices; see also http://wattsupwiththat.com/2012/10/04/the-cyber-bonfire-of-gisss-vanities/), among numerous others.

[12] *See EPIC v. DOD*, 241 F.Supp.2d 5 (D.D.C. 2003) (court ruled that the publisher of a bi-weekly electronic newsletter qualified as the media, entitling it to a waiver of fees on its FOIA request)*; Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1181-82 (10th Cir. 2005) (fee waiver granted for group that "aims to place the information on the Internet"; "Congress intended the courts to liberally construe the fee waiver requests of noncommercial entities").

to the public at large and at no cost through one or more of the following: (a) newsletters; (b) opinion pieces in newspapers or magazines; (c) CEI's websites, which receive approximately 150,000 monthly visitors (appx. 125,000 unique)(*See, e.g.,* *www.openmarket.org*, one of several blogs operated by CEI providing daily coverage of legal and regulatory issues, and *www.globalwarming.org* (another CEI blog); (d) in-house publications for public dissemination; (e) other electronic journals, including blogs to which our professionals contribute; (f) local and syndicated radio programs dedicated to discussing public policy; (g) to the extent that Congress or states engaged in relevant oversight or related legislative or judicial activities find that which is received noteworthy, it will become part of the public record on deliberations of the legislative branches of the federal and state governments on the relevant issues.

CEI also is regularly cited in newspapers,[13] law reviews,[14] and legal and scholarly publications.[15]

More importantly, with a foundational, institutional interest in and reputation for its leading role in the relevant policy debates and expertise in the subject of transparency, energy- and environment-related regulatory policies CEI unquestionably has the "specialized knowledge" and "ability and intention" to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the "public-at-large."

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[13] *See, e.g.,* Al Neuharth, "Why Bail Out Bosses Who Messed It Up," *USA Today*, Nov. 21, 2008, at 23A (quotation from Competitive Enterprise Institute) (available at 2008 WLNR 22235170); Bill Shea, "Agency Looks Beyond Criticism of Ads of GM Boasting About Repaid Loan," *Crain's Detroit Business*, May 17, 2010, at 3 (available at 2010 WLNR 10415253); Mona Charen, Creators Syndicate, "You Might Suppose That President Obama Has His Hands ...," *Bismarck Tribune*, June 10, 2009, at A8 (syndicated columnist quoted CEI's OpenMarket blog); Hal Davis, "Earth's Temperature Is Rising and So Is Debate About It," *Dayton Daily News*, April 22, 2006, at A6 (citing CEI's GlobalWarming.Org); *Washington Examiner*, August 14, 2008, pg. 24, "Think-Tanking" (reprinting relevant commentary from OpenMarket); Mark Landsbaum, "Blogwatch: Biofuel Follies," *Orange County Register*, Nov. 13, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 23059349); *Pittsburgh Tribune-Review*, "Best of the Blogs," Oct. 7, 2007 (citing OpenMarket) (available in Westlaw news database at 2007 WLNR 19666326).

[14] *See, e.g.,* Robert Hardaway, "The Great American Housing Bubble," 35 *University of Dayton Law Review* 33, 34 (2009) (quoting Hans Bader of CEI regarding origins of the financial crisis that precipitated the TARP bailout program).

[15] *See, e.g.,* Bruce Yandle, "Bootleggers, Baptists, and the Global Warming Battle," 26 *Harvard Environmental Law Review* 177, 221 & fn. 272 (citing CEI's GlobalWarming.Org); Deepa Badrinarayana, "The Emerging Constitutional Challenge of Climate Change: India in Perspective," 19 *Fordham Environmental Law Review* 1, 22 & fn. 119 (2009) (same); Kim Diana Connolly, "Bridging the Divide: Examining the Role of the Public Trust in Protecting Coastal and Wetland Resources," 15 *Southeastern Environmental Law Journal* 1, 15 & fn. 127 (2006) (same); David Vanderzwaag, *et al.*, "The Arctic Environmental Protection Strategy, Arctic Council, and Multilateral Environmental Initiatives," 30 Denver Journal of International Law and Policy 131, 141 & fn. 79 (2002) (same); Bradley K. Krehely, "Government-Sponsored Enterprise: A Discussion of the Federal Subsidy of Fannie Mae and Freddie Mac, 6 North Carolina Banking Institute 519, 527 (2002) (quoting Competitive Enterprise Institute about potential bailouts in the future).

The disclosure will contribute "significantly" to public understanding of government operations or activities. *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is "likely to contribute" to an understanding of specific government operations or activities*.

After disclosure of these records, the public's understanding of this unexplored aspect of the highly controversial claims of executive branch and administration transparency, and particularly how EPA's controversial (particularly in Browner's case, for reasons stated) secondary email accounts came to be created, inherently will be significantly enhanced. The requirement that disclosure must contribute "significantly" to the public understanding is therefore met.

As such, the Requester has stated "with reasonable specificity that its request pertains to operations of the government," and "the informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having explained with reasonable specificity how those documents would increase public knowledge of the functions of government." *Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA deviates from prior practice on similar requests and refuses to waive our

fees under the "significant public interest" test, which we will then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...") and 40 C.F.R. §2.107(d)(1) ("No search or review fees will be charged for requests by educational institutions...or representatives of the news media."); see also 2.107(b)(6).

However, we note that as documents are requested and available electronically, there are no copying costs.

Requester repeats by reference the discussion as to its publishing practices, reach and intentions to broadly disseminate, all in fulfillment of CEI's mission, from pages 18-21, *supra*.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with Agency activities in this controversial area or, as the Supreme Court once noted, what their government is up to.

For these reasons, Requester qualifies as a "representative[] of the news media" under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the pubic. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can

qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep't of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at *32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women's Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format; as such, there are no duplication costs other than the cost of a compact disc(s).

CONCLUSION

We expect the agency to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We expect this all aspects of this request be processed free from conflict of interest.

We request the agency provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at

least to inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See CREW v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at *14 (D.D.C. Sept. 28, 2011)(addressing "the statutory requirement that [agencies] provide estimated dates of completion").

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but *as necessary* in hard copy to my attention at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, e.g., *CREW v. FEC*.

If you have any questions please do not hesitate to contact me.

Respectfully submitted,

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